ORIGINAL

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No. 09-63

Supreme Court, U.S.
FILED
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2008

E.K. McDANIEL, WARDEN, Petitioner,

v.

RICKY DAVID SECHREST, Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Ricky David Sechrest, asks leave to file the attached opposition to a petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Counsel for respondent was appointed by the United States District Court for the District of Nevada under former 21 U.S.C. § 848(q), now 18 U.S.C. § 3599(a)(2). See Supreme Court Rule 39.1.

Dated this 17th day of August, 2009.

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E.K. McDANIEL, WARDEN, Petitioner,

v.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED
(CAPITAL CASE)

1. In a pre-AEDPA habeas corpus case, in which deference is not accorded to the legal conclusions of state courts, did the Court of Appeals err in finding that constitutional error was not harmless as to the penalty determination under the specific facts of this case, where

   a) the prosecutor's misconduct erroneously represented to the jury that the defendant could be released immediately, and would certainly be released at some point, if he were sentenced to life imprisonment without the possibility of parole instead of death, which undermined a primary theme of mitigation, which was the defendant's youth; and

   b) the ineffective assistance of counsel, in allowing the prosecutor to call the defense mental health expert as his own witness, after defense counsel had decided not to present the expert's testimony, resulted in the presentation of damaging evidence to the jury?

2. Is there any basis for reviewing this matter on certiorari, where the constitutional errors involved are highly idiosyncratic and unlikely to recur, and there is no important constitutional issue to be resolved on which there is a disagreement among the federal courts of appeals or between the state and federal courts?

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Respondent Ricky Sechrest submits the following brief in opposition to the petition for writ of certiorari filed by the petitioner, the Warden of Ely State Prison, who represents the interests of the State of Nevada. Respondent accepts the representations made by the petitioner in the procedural sections of the petition for writ of certiorari.

STATEMENT OF THE FACTS

In general, respondent accepts the petitioner's statement of the case and facts. Respondent notes the following additional points.

The petitioner describes the prosecutorial misconduct at issue in this case as argument that "minimized the chances that Sechrest would actually die in prison if sentenced to life without the possibility of parole." Petition at 2. In fact, the prosecutor's argument was a calculated and consistent attempt to mislead the jury about the likelihood - - indeed, the supposed certainty - - that the defendant would be released on parole if he was not sentenced to death, although the defendant was in fact statutorily barred from being released on parole.

The prosecutor began indoctrinating the jurors during voir dire, by asking prospective jurors whether they would consider the possibility of eventual release on parole in making the penalty decision:

> The judge is going to give you an instruction at the penalty phase, if we get there, that he will impose the penalty that you say, but if you say life in prison without parole, that doesn't mean that the pardons board can't let him out. Now, would you consider that when you arrive at your verdict?
>
> . . . .
>
> Okay. Now, [defense counsel] has talked a lot about the possible penalties if we get there being life with possibility of parole, life without possibility of parole and death. And His Honor will, I imagine, because many times I have been in front of His Honor, will give you a charge, a jury instruction saying if you impose life without

parole that really doesn't mean life forever. If he gives you that charge, will you take that into consideration in deciding what the verdict ought to be?

Sechrest, 549 F.3d at 798.

During the penalty phase argument, the prosecutor returned to this theme:

> Whatever sentence you return in your verdict this Court will impose that sentence. Whether or not the State Board of Pardons commissioners, upon review, if requested by the defendant, would change that sentence, the Court has no way of knowing. Indeed, you don't either. The State Board of Pardon commissioners, however, would have the power to modify any sentence at a later date. And what that means is, let's say you fall-I am going to talk about his defense. It was a fraud. And let's say you fall for that fraud and you say well, gee, I just can't bring myself to do what I should do, and I am going to impose life without parole. You don't die in prison of old age. People get out. Now, are you prepared to risk the life of some other person or child by giving him the opportunity to get out? That will be your risk. That will be your burden.
>
> . . . .
>
> Never getting out. As the judge has instructed you, the pardons board has the ultimate authority to review any sentence, to pardon anybody. If you return a verdict of life without possibility of parole, I represent to you as a lawyer, as an attorney for the people of this county, that the pardons board has the authority to commute that tomorrow if they want to. They won't of course, but they have the authority to. So don't buy that he is going to go to jail forever. It just doesn't happen.

549 F.3d at 779 (emphasis added).

Defense counsel argued that the jury should consider mercy in making its penalty determination; that "it is not hopeless, totally impossible to change this individual, and that Mr. Sechrest can perhaps become a worthwhile and productive citizen even if he is in jail"; and that the defendant is a "young man," with an emotionally deprived background; and that a statutory mitigating factor "is the youth of the defendant at the time." Sechrest v. Ignacio, Ct. App. No. 04-

99004, 4 Excerpts of Record 925-928, 933.[1] But counsel also had to argue against the opinion of his own expert, presented by the prosecution, that the defendant was incapable of changing, and to minimize the seriousness of the defendant's record which had come in through the expert's testimony. Id., 4 EOR 925-928, 931-932.

The prosecutor's arguments were based on a false description of the relevant law. Under Nev. Rev. Stat. § 213.1099(4)(c), respondent could not have his sentence commuted to one which would allow him to be released, because he was on probation at the time of the offense. Sechrest, 549 F.3d at 810.[2] Although petitioner now assumes the falsity of the prosecutor's arguments without conceding that point, Petition at 10-11, in the Court of Appeals counsel admitted "I am not defending what the prosecutor said, I have not done that at all," and agreed that some of the prosecutor's statements were "wrong as a matter of law." Sechrest v. Ignacio, Ct. App. No. 04-99004, recording of oral argument (February 15, 2007).

Respondent also notes that the Court of Appeals did not address the argument that most of the aggravating factors underlying the determination of death eligibility and the selection of the penalty were invalid, including a depravity factor that is invalid under Godfrey v. Georgia, 446 U.S.

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[1] Under Nevada law, any juror is entitled to consider as mitigation "any desire you may have to extend mercy to the defendant. . . ." Evans v. State, 112 Nev. 1172, 1204, 926 P.2d 265, 285-286 (1996).

[2] At the time of Mr. Sechrest's offense in 1983, state law appeared to preclude any power to grant clemency for anyone sentenced to life imprisonment without possibility of parole. See Nev. Const. Art. 5 § 14(2). The Nevada Supreme Court later decided that the pardons board did have the power to reduce a sentence of life without parole to a sentence allowing parole subject to the limitations imposed by Nev. Rev. Stat. § 213.1099(4). Smith v. State, 106 Nev. 781, 784, 802 P.2d 628, 630 (1990). Nev. Rev. Stat. § 213.1099(4)(e) prohibits release of an individual who has failed probation. See also § 213.1099(4)(c) (criminal conduct related to the use of drugs or alcohol). The petitioner does not contest the fact that respondent was statutorily ineligible for release on parole under that section.

420, 428 (1980), and two felony-murder aggravating factors that are invalid under state law. McConnell v. State, 120 Nev. 1043, 1069, 102 P.3d 606, 624 (2004). Respondent argued that consideration of these invalid factors also corrupted the fairness of the penalty determination, but the Court of Appeals did not address them because of its conclusion that the constitutional violations it did address could not be found harmless. Sechrest, 549 F.3d at 814, n. 13. The petitioner has not sought certiorari review on the propriety of the Court of Appeals' decision that the district court must consider the arguments on the invalidity of the aggravating factors on remand. Sechrest, 549 F.3d at 804.

REASONS FOR DENYING THE WRIT

Petitioner has made no attempt to argue that this case falls within the small class of cases in which review on certiorari is appropriate. Sup. Ct. Rule 10. Petitioner does not point to any conflict among the courts of appeals, or between the federal and state courts, on any important constitutional question. Sup. Ct. Rule 10(a,b,c). The errors themselves are so idiosyncratic that any decision on their merits would have no discernible precedential effect. Petitioner does not cite any case, and respondent has found none, in which a prosecutor's argument that erroneously guaranteed to the jury that imposing a sentence less than death would result in the defendant's release was found to be proper. In fact, under the same circumstances, in which release on parole was not legally a possibility, the commutation instruction -- however permissible it may be in the abstract -- has also been found to be misleading by the Nevada Supreme Court itself. Geary v. State, 112 Nev. 1434, 1440-1441, 930 P.2d 719, 724-725 (1996); see California v. Ramos, 463 U.S. 992, 1009 (1983) (permissible to give "accurate information" in instruction on commutation); see also Coleman v. Calderon, 210 F.3d 1047, 1050-1051 (9th Cir. 2000) (noting that prosecutor's argument on necessity

of imposing death sentence to prevent release on parole exacerbated prejudice of misleading instruction); Gallego v. McDaniel, 124 F.3d 1065, 1074-1077 (9th Cir. 1997).

There can be no rational dispute that prosecutorial argument that misstates the law is improper.[3] Given the defense's emphasis on the defendant's youth and possibility of reform as the primary reason to spare his life, this misconduct effectively eviscerated the defense argument for life and necessarily had a "substantive or injurious effect on the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 627 (1991). Similarly, petitioner does not cite any case, and respondent has found none, in which defense counsel has decided not to present an expert's testimony because the expert's opinion was unfavorable, but has agreed to allow the prosecutor to call the defense expert as his own witness and to elicit and exploit the expert's opinion that the defendant was a "sociopath." There is no case that is even close to suggesting that counsel's action would satisfy the standard of reasonably effective assistance under Strickland v. Washington, 466 U.S. 668 (1984). There is thus no legal question before this Court that justifies review on certiorari.

In assessing the prejudicial effect of the errors in this case, the Court of Appeals carefully analyzed the likely effect of the errors on the jury's fact-specific consideration of the appropriate penalty, "in the whole context of the particular case." See Calderon v. Coleman, 525 U.S. 141, 145-147 (1998) (per curiam) (reversing grant of habeas relief where Court of Appeals failed to conduct

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[3] The argument that imposing the death penalty was the only way to prevent the defendant for killing was also plainly improper, Darden v. Wainwright, 477 U.S. 168, 180 (1986); see Kelly v. Stone, 514 F.2d 18, 19 (9th Cir. 1975) (argument that "maybe the next time [the victim] will be someone you known"); Mashburn v. State, 522 S.W.2d 900, 901 (Tex. Crim. App. 1975) (prejudicial to argue that jury should impose excessive sentence to compensate for, or protect against, actions of pardons board.), as was the prosecutor's characterization of the defense case as a "fraud." United States v. Sanchez, 176 F.3d 1214, 1224 (9th Cir. 1999) (referring to defense as a "sham").

analysis of prejudice under Brecht), on remand, Coleman v. Calderon, 210 F.3d 1047, 1050-1051 (9th Cir. 2000) (conducting Brecht analysis and finding misleading instruction on commutation prejudicial, where prosecutor emphasized possibility of release in argument, in case involving rape and murder by defendant with previous convictions for rape of 13-year old girl and lewd conduct with 11 year-old girl, and commission of series of assaults in prison). The Court of Appeals considered prejudice in the specific context of the Nevada death penalty system, in which no juror is ever required to vote for imposition of a death sentence, no matter how greatly the statutory aggravating factors outweigh the mitigation, no matter what non-statutory aggravation is presented, and no matter if there is no mitigation at all. Sechrest, 549 at 814; see, e.g., Evans v. State, 117 Nev. 609, 634, 28 P.3d 498, 515 (2001); Evans v. State, 112 Nev. at 1204 (juror entitled to consider "any desire you have to extend mercy" as mitigation); Bennett v. State, 111 Nev. 1099, 1109-1110, 901 P.2d 676 (1995).

Here, the defense case for imposing a sentence less than death was the defendant's youth, the possibility that he could change for the better if he was incarcerated, and an appeal for mercy. The two constitutional violations here devastated that case: the prosecutor's misconduct guaranteed that the defendant would be released, and thus turned the defendant's youth into a reason for executing him, while the defense expert's opinion, introduced because of counsel's ineffectiveness, told the jury that the defendant could never change. The Court of Appeals' decision in this case was eminently sound; and it is worth noting that no judge of the Court of Appeals even called for a vote on the state's petition for rehearing en banc, which raised essentially the same issues raised in the petition for writ of certiorari. Pet. App. 167a. In sum, the petitioner's argument is at best a request for review of a supposed "misapplication of . . . properly stated rule[s] of law," which is "rarely" a

basis for certiorari review. Sup. Ct. Rule 10.[4]

Lacking any appropriate basis for granting certiorari on the legal issues in this case, petitioner asks this court to engage in "error correction" which is, of course not this Court's function on certiorari review. See, e.g., Kyles v. Whitley, 514 U.S. 419, 456 (1995) (Scalia, J., dissenting). Further, the petitioner makes no rational case that the Court of Appeals committed any error at all in finding that the constitutional violations in this case were prejudicial under Brecht, on the premise that the offense was too egregious to produce any sentence other than death. In fact, the Nevada Supreme Court has reversed death sentences for quite egregious offenses on the basis of no more serious errors than those present here. In Evans v. State, 117 Nev. 609, 618-620, 28 P.3d 498, 515-517 (2001), the court reversed a death sentence imposed for the killing of four people, committed for revenge because one of the victims was an informer, based on prosecutorial argument confusing the aggravating evidence that could be used for establishing death eligibility with the evidence use in the penalty selection process. In Geary v. State, 112 Nev. at 1440, the Nevada Supreme Court reversed a death sentence imposed upon a defendant who was convicted of first degree murder, was released on parole, and committed first degree murder again, based in part on the commutation instruction which, as in this case, inaccurately informed the jury that the defendant could be released on parole. In Williams v. Taylor, 529 U.S. 362, 367 (2000), this Court found prejudicial error in the failure to discover and present mitigation in a case in which the defendant killed the victim with a

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[4] The state's argument that the Court of Appeals has reversed capital sentences at a "disproportionate" rate, Pet. at 5-6, is incoherent as a legal argument. There is no factual showing of any such "disproportionate" rate of reversal, and, given the necessity for reviewing each case in the context of its own facts, there is no legal basis for arguing that the Court of Appeals are reversing too many death sentences, or for deciding that granting certiorari in this case would be an appropriate response by this Court.

mattock, and the aggravation included an assault on an elderly woman that left her in a vegetative state, an assault on an elderly victim that began with the defendant starting a fire outside the victim's house, and an arson committed in jail, as well as two prior convictions. And, in Stringer v. Black, 503 U.S. 222, 225 (1992), this Court invalidated a death sentence for two "gruesome" robbery murders planned by the defendant, based on an unconstitutionally vague aggravating circumstance.

If there is anything this Court's death penalty jurisprudence teaches us, there is no case in which the imposition of a death sentence can be compelled. See Sumner v. Shuman, 483 U.S. 66, 78-81 (1987) (invalidating Nevada mandatory death penalty provision for inmate serving life imprisonment without possibility of parole who commits first degree murder). Petitioner, however, seeks to upset a generation of this Court's jurisprudence, and asks this Court to hold that some capital cases are so horrible that imposition of a death sentence is a foregone conclusion; and Nevada proposes that this Court should allow reviewing courts to identify such cases by saying that "I know it when I see it." Petition at 7, quoting Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). While the facts in this case are painful and difficult to contemplate, so are the circumstances of every first-degree murder. Petitioner offers no argument explaining why simply labeling a case "heinous" or "horrible" can render all constitutional errors, no matter how egregious, harmless; and this Court has recognized that such labels do not rationally narrow the class of first-degree murders for which a death sentence can be imposed under the Eighth Amendment. Maynard v. Cartwright, 486 U.S. 356, 363-364 (1988); Godfrey v. Georgia, 446 U.S. 420, 428-429 (1980). Petitioner does not explain how invoking such labels could justify abandoning the normal course of review for harmless error, which is necessary to enforce the right to individualized sentencing, in favor of no rational standard at all.

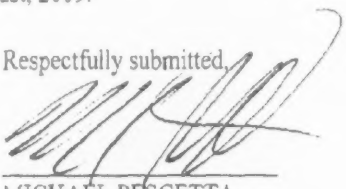
What petitioner seeks is, essentially, a return to the standardless discretion to impose, and then to uphold, a death sentence that this Court found inconsistent with the Eighth Amendment in Furman v. Georgia, 408 U.S. 238 (1972). This Court should reject petitioner's invitation to throw its death penalty jurisprudence into chaos, and it should deny the petition for writ of certiorari.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

DATED this 17th day of August, 2009.

Respectfully submitted,



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